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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

PETITION NOT PRINTED
REPLY BRIEF NOT PRINTED

SYDNEY GETTELMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1266

SYDNEY GETTELMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the district court (Pet. App. B) and of the court of appeals (Pet. App. A) were entered without opinions; they are unreported.

JURISDICTION

The order of the court of appeals was entered on January 4, 1972. The petition for a writ of certiorari was filed on April 3, 1972. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the dismissal of petitioner's complaint for failure to state a claim upon which relief could be granted and on the ground of sovereign immunity was correct.

2. Whether either the district court judge or a judge of the court of appeals should have disqualified himself from participating in the present case.

STATUTES AND REGULATIONS INVOLVED

Section 7623 of the Internal Revenue Code of 1954, Section 455 of Title 28, United States Code, the pertinent provisions of Sections 701-702 of Title 5, United States Code, and of Sections 301.7623-1(a) and (c) of the Treasury Regulations on Income Tax (1954 Code) are set forth in the Appendix, *infra*, pp. 8-10.

STATEMENT

Petitioner commenced the present civil action in the United States District Court for the Northern District of Illinois, seeking a judicial declaration that there existed a valid contract between himself and the Commissioner of Internal Revenue, and requesting that the court order the Commissioner to exercise his discretion in favor of petitioner by paying him a reward (Pet. 8; Pet. App. A, p. 1). In the complaint, petitioner alleged that he had provided information to a special agent of the Internal Revenue

Service showing improprieties in the estate tax returns of Frances Conne and Louis Conne, and in the tax returns prepared for Muncie Parts Manufacturing Company, Inc., Muncie Parts Manufacturing Company and Shafer Manufacturing Company, Inc. He further stated that the District Director had rejected his formal claim for reward on the ground that the information submitted was insufficient to justify a reward (Pet. 2, 7; Pet. App. A, p. 1).

Respondent moved to dismiss petitioner's action on grounds of sovereign immunity, lack of subject matter jurisdiction, and petitioner's failure to state a claim upon which relief could be granted; on February 17, 1971, the motion was granted. The district court held (Pet. App. B, p. 2) that petitioner "has not alleged the substance of a contract cause of action against the United States and plaintiff is not entitled to recover upon the facts alleged." The court of appeals affirmed (Pet. App. A).

ARGUMENT

The decision below is correct. It is not in conflict with any decision of this Court or of any other court of appeals and there is thus no reason for further review.

1. Petitioner's contention is essentially that, by providing information concerning alleged tax irregularities and filing a formal claim of reward, he became entitled to a reward payment from the Commissioner under an implied contract. But the Commissioner is under no obligation, contractual or other-

wise, to pay a sum of money to petitioner; reward payments are a matter that has been left by statute to the Commissioner's discretion. See, *e.g.*, *Gordon* v. *United States*, 36 F. Supp. 639 (Ct. Cl.); *Katzberg* v. *United States*, 36 F. Supp. 1023 (Ct. Cl.), certiorari denied, 314 U.S. 620. Section 7623 of the Internal Revenue Code of 1954 (App. *infra*, p. 8) provides that the "Secretary or his delegate * * * is authorized to pay such sums * * * as he may deem necessary for * * * bringing to trial and punishment persons guilty of violating internal revenue laws * * *." And the fact that he might decline to make such a payment, even where "as a result [of the information supplied] the United States recovered some taxes, [does] not provide sufficient basis for a claim" (*Barker* v. *Lein*, 366 F.2d 757, 758 (C.A. 1)). See also Treasury Regulations 301.7623-1(a) and 301.7623-1(c), App. *infra*, pp. 8-9.[1]

In any event, since the present suit is against the Commissioner in his official capacity as an agent of the United States, and seeks to compel him to exercise his discretion in favor of petitioner by paying him a reward from funds of the Treasury, it is, as the court of appeals noted (Pet. App. A, p. 2), "in fact, [a suit] against the United States." *Dugan* v.

[1] To the extent petitioner suggests that his reward claim was not processed by the Commissioner, his contention is answered by the observation in the opinion below (Pet. App. A, p. 2) that "it is clear that the Commissioner has processed [petitioner's] claim for a reward from a letter with the signature of the District Director, Indianapolis, received in November 1968 by [petitioner] as admitted in his brief to this Court."

Rank, 372 U.S. 609, 620; *Land* v. *Dollar*, 330 U.S. 731, 738. As such, it is barred by the doctrine of sovereign immunity, since, in the words of the court below (Pet. App. A, p. 2), "it is well established [that] the sovereign cannot be sued without its consent. *Magnus* v. *United States*, 234 F.2d 673 (7 Cir., 1956)." It is undisputed that there has been no consent to this suit.

2. Petitioner also contends that district court Judge William J. Lynch and court of appeals Judge Otto Kerner had a "substantial interest" in the outcome of this case, within the meaning of 28 U.S.C. 455, and therefore should have disqualified themselves. The claim is based on Chicago newspaper articles relating to a federal investigation of the income tax returns and other activities of numerous individuals including these judges (Pet. 3, 4; see Pet. App. for copies of Newspaper Reports).[2] Judge Kerner was indicted prior to entry of the final order of the court of appeals in this case, although the order had been approved by the court of appeals before his indictment was returned (Pet. App. A, p. 1).

Disqualification was not required in this case, however. The relevant statute, 28 U.S.C. 455, provides that a judge, trial or appellate—

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[2] Petitioner never raised the question of disqualification of Judge Lynch in the court of appeals, despite the fact that the Chicago newspaper articles on which he relies were published before the case was argued in the court of appeals. Thus, the issue is not properly before this Court. See *Blair* v. *Oesterlein Co.*, 275 U.S. 220, 225; *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380.

> shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

And the statutory phrase "substantial interest" has been construed to mean a pecuniary or beneficial interest. *United States* v. *Bell*, 351 F.2d 868, 878 (C.A. 6), certiorari denied, 383 U.S. 947; *Adams* v. *United States*, 302 F.2d 307 (C.A. 5).

Neither Judge Lynch nor Judge Kerner had a financial, pecuniary or beneficial interest in the outcome of the instant case; neither was related to or connected with any party; they were not of counsel; and they were not material witnesses. Accordingly, the mandatory disqualification requirement under the first clause of 28 U.S.C. 455 does not apply. Nor was the judges' failure to disqualify themselves an abuse of discretion under the last clause of the statute, which leaves disqualification to the "conscience of the particular judge." *United States* v. *Ravich*, 421 F.2d 1196, 1205 (C.A. 2), and cases cited therein. The reported federal investigations involving these judges (see Pet. App. C) were wholly unrelated to the present case, and it was therefore not improper for the judges to refuse to disqualify themselves.[3]

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[3] Petitioner's separate claim that his Sixth Amendment rights were violated because he was not represented by counsel in this civil action is insubstantial. Moreover, since the issue was not raised in the courts below, it is not properly before this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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MAY 1972.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7623. EXPENSES OF DETECTION AND PUNISHMENT OF FRAUDS.

The Secretary or his delegate, under regulations prescribed by the Secretary or his delegate, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law.

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

§ 301.7623-1 *Rewards for information relating to violations of internal revenue laws.*

(a) *In general.* A district director may approve such reward as he deems suitable for information that leads to the detection and punishment of any person guilty of violating any internal revenue law, or conniving at the same. The rewards provided for by section 7623 are limited in their aggregate to the sum appropriated therefor and shall be paid only in cases not otherwise provided for by law.

* * * * *

(c) *Amount and payment of reward.* All relevant factors, including the value of the information furnished in relation to the facts developed by the investigation of the violation, shall be taken into account by a district director in de-

termining whether a reward shall be paid, and, if so, the amount thereof. The amount of a reward shall represent what the district director deems to be adequate compensation in the particular case, normally not to exceed 10 percent of the additional taxes, penalties, and fines which are recovered as a result of the information. No reward, however, shall be paid with respect to any additional interest that may be collected. Payment of a reward will be made as promptly as the circumstances of the case permit, but generally not until the taxes, penalties, or fines involved have been collected. However, the informant may waive any claim for reward with respect to an uncollected portion of the taxes, penalties, or fines involved, in which case the claim may be immediately processed. No person is authorized under these regulations to make any offer, or promise, or otherwise to bind a district director with respect to the payment of any reward or the amount thereof.

* * * * *

5 U.S.C.:

§ 701. *Application; definitions*

(a) This chapter applies, according to the provisions thereof, except to the extent that—

* * * * *

(2) agency action is committed to agency discretion by law.

* * * * *

§ 702. *Right of review*

A person suffering legal wrong because of agency action, or adversely affected or aggrieved

by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

28 U.S.C.:

§ 455. *Interest of justice or judge*

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

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